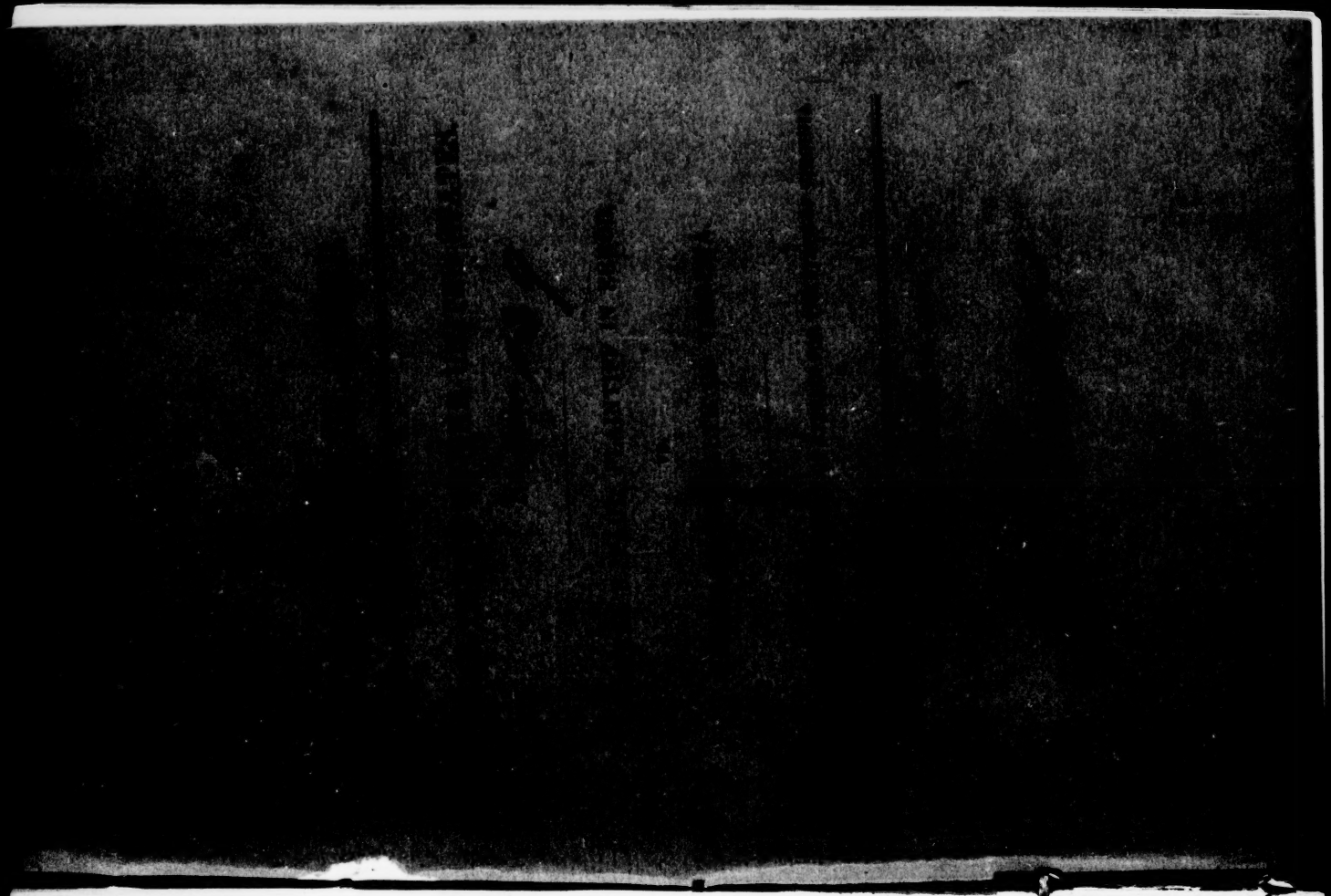

# SUPREME COURT OF THE UNITED STATES.

## No. 288.

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SAMUEL B. PAUL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

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IN ERROR TO THE SUPREME COURT OF APPEALS FOR THE STATE OF VIRGINIA.

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a Hon. SALMON P. CHASE, Chief Justice of the Supreme Court of the United States:

The petition of Samuel B. Paul respectfully shows, that a certain judgment was rendered against your petitioner at the suit of the Commonwealth of Virginia, at a Circuit Court for the city of Petersburg, held on the 5th day of June, 1866, in which suit your petitioner set up and claimed a right, privilege, and exemption under the Constitution of the United States, the construction of which instrument was thereby drawn in question, and in which said suit the decision was against the right, privilege, and exemption so claimed as aforesaid, which said judgment was afterwards in all things affirmed by the Supreme Court of Appeals of the Commonwealth of Virginia, on the appeal of your petitioner in that behalf, to wit, on the 12th day of October, 1866.

That in the said suit a penalty was claimed and adjudged against your petitioner for carrying on within the said Commonwealth the business of insurance or underwriting, as agent of certain corporations and citizens of the State of New York, which said business was, by the laws of the said Commonwealth of Virginia, permitted to be carried on by or for corporations or citizens of the said Commonwealth of Virginia without any such penalty, which said judgment was contrary to the provisions of the Constitution in that behalf.

Wherefore, your petitioner prays your honor to allow a writ of error to the said Supreme Court of Appeals of the State of Virginia, being the highest court of law of the said State in which a decision of the said suit could be had for the correction of the error aforesaid, and the reversal of the said judgment according to the form of the statute in such cases made and provided.

October 19, 1867.

b The writ of error is allowed as prayed, to issue with citation on filing bond with approved surety in the penalty of three hundred dollars.

S. P. CHASE,
*Chief Justice U. States.*

Endorsed: Sup. Court U. S. Sam'l B. Paul, *v.* Commonwealth of Virginia. Petition for writ of error.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of Appeals of the Commonwealth of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of Appeals of the Commonwealth of Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Samuel B. Paul *ag'st*

The Commonwealth of Virginia, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Samuel B. Paul, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-six.

[SEAL.] D. W. MIDDLETON,
*Clerk of the Supreme Court of the United States.*

Issued 5th November, 1867.

Allowed by

S. P. CHASE,
*Chief Justice U. States.*

*d* Know all men by these presents, that we, Samuel B. Paul, of the State of Virginia, and Esau Pickrell, of the District of Columbia, are held and firmly bound unto the Commonwealth of Virginia in the full and just sum of three hundred dollars, to be paid to the said Commonwealth of Virginia, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this second day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas, lately at a Circuit Court for the city of Petersburgh, in the State of Virginia, in a suit depending in said court between the Commonwealth of Virginia and Samuel B. Paul, judgment was rendered against the said Paul, and the said judgment was afterwards in

all things affirmed by the Supreme Court of Appeals of the Commonwealth of Virginia, on the 12th day of October, A. D. 1866; and the said Samuel B. Paul, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Virginia, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next: Now, the condition of the above obligation is such, that if the said Samuel B. Paul shall prosecute the said writ to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

SAM'L B. PAUL. [L.S.]
ESAU PICKRELL. [L.S.]

Sealed and delivered in presence of—
JNO. A. MCPHERSON.

Approved by—

S. P. CHASE, *Chief Justice.* [L.S.]

The United States of America to the Commonwealth of Virginia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Appeals of the Commonwealth of Virginia, wherein Samuel B. Paul is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this fifth day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

S. P. CHASE, *Chief Justice.*

On this 11th day of November, in the year of our Lord one thousand eight hundred and sixty-seven, personally appeared Temple Ellett before me, the subscriber, a notary public, for the city of Richmond, duly commissioned and qualified, according to law, and makes oath that he delivered a true copy of the within citation to F. H. Pierpoint, governor of the Commonwealth of Virginia, on the 8th day of November, 1867.

ALFRED SHIELD, *N. P.*

Sworn to and subscribed the , A. D. 18 .

To the Supreme Court of Appeals of Virginia:

The petition of Samuel B. Paul respectfully represents, that he is aggrieved by a judgment rendered by the Circuit Court of the City of Petersburg, on the 5th day of June, 1866, in a case of the com-

monwealth against your petitioner; a transcript of the record whereof is herewith presented as part of this petition.

The question raised by this proceeding is, whether the act of the legislature of Virginia, passed Feb'y 3d, 1866, (Ses. act, 1865, 6 p. 206,) entitled "An act to require a deposit of securities to be made by foreign insurance companies doing business in this State" be not in violation of the Constitution of the United States.

The record shows that enorous exactions and burdens are imposed by the above act, in connection with other acts, upon citizens of other States doing business here under the form of incorporated companies, which are not imposed upon citizens of the State itself doing the same business under the same form; and that, in fact, the agents of the former, necessary to carry on their business, are, in addition, harrassed by fines and assessments, which operate as a virtual seclusion and prohibition of said agency, until compliance by their principals with the harsh and unconstitutional discrimination thus enforced.

Your petitioner is advised and insists that this legislation is in conflict with the first clause of § 2, of Art. IV, of the Constitution of the United States, which provides that "the citizens of each
2 State shall be entitled to all the privileges and immunities of citizens in the several States," and especially when considered in connection with the third clause of § VIII, of Art. I, of that instrument. It is respectfully insisted that under these provisions of the Constitution, the citizens of New York and other States are entitled to the same privileges and immunities in the State of Virginia, in respect to trade and commerce and the necessary means of agencies to facilitate and carry on commercial intercourse and business between themselves and the citizens of Virginia and other States of the Union, as the citizens of Virginia are entitled to claim and exercise; and that to hold otherwise would be to ignore the fundamental principles and the great objects of the Union.

That a merchant, or copartnership of merchants, citizens and residents of New York, whether their copartnership be of general or restricted liability, and whether authorized by a general or special law, would be entitled to employ agents in Virginia in the negotiation of sales of their merchandise and collection of the proceeds, without being subjected, directly, themselves, or individually, through their agents, to other or greater burthens of taxation, or other or greater restrictions of other kind, than are equally imposed on merchants, citizens and residents of Virginia, engaged in the same business and using the same agencies in its management, cannot be questioned. And if, by the laws of New York, her citizens and those of other States, for the greater convenience of trade and commerce, are authorized to associate themselves in any other form or mode of business, union or connection, it is not perceived why their rights,
3 as citizens, are thereby destroyed or impaired, or that contracts in the course of their business may not be lawfully and constitutionally made by and with them in other States, as well as in the State of New York, and as well by agents as by direct communi-

cation. And if the same kind of business association is authorised by the laws of Virginia among her own citizens, to carry on the same kind of business in her midst, and to negotiate and fulfil contracts in the course of that business by resident agents in the same manner, it is still more difficult to perceive that citizens of other States can rightfully be excluded from the same privileges and immunities. Corporations of the character of those involved in this litigation are, in legal effect, partnership associations, with restricted powers and liabilities defined by special legislation, the acceptance of which by the members constitutes the basis of the contract on their part. What is called the "act of incorporation" does not confer any rights of citizenship upon the persons comprising the corporation, nor take away or impair any rights of citizenship which they before enjoyed. It only enables them to carry on, collectively, in the manner and by the means prescribed, the business which each individual citizen was constitutionally and legally authorized to do in his own name. Its chief object, and only distictive legal characteristic is, for certain purposes, to empower a number of men to act as one individual for a certain or uncertain time, and in a certain way.

The association thus formed under express sanction of law, is sometimes viewed in its aggregate capacity, and sometimes in respect of the members of which it is composed. When viewed in
4 its aggregate capacity, it is commonly spoken of as an "artificial being," "a legal entity," and "as existing only in contemplation of law," in which sense, however, it has been repeatedly recognized by the courts as an "inhabitant," a "person," and a "citizen."—2 Coke Ins., 697, 703; Gardner *v.* Crump, Cowper 83; Ontario Bank *v.* Burrell, 10 Wend. 186; People *v.* Utica Ins. Co., 10 Johns, p. 381–2; The United States *vs.* Amedy, 11 Wheat. 393 and 412; Beaston *vs.* the Farmer's Bank of Delaware, 12 Peters 135; Louisville R. R. Co. *vs.* Letson, 2 How. S. C. R., 497; Conroe *vs.* National Protection Ins. Co., 10 How., Pr. R. 403–4; Marshal *v.* Bal. & Ohio R. R. Co., 16 How. S. C. R. 314. In the case of the Louisville R. Co. *vs.* Letson above cited, the Supreme Court of the United States say: "But there is a broader ground upon which we desire to be understood; upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is that a corporation created and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, capable of being treated as a citizen of that State as much so as a natural person. Like a citizen, it makes contracts, and though, in regard to what it may do in some particulars, it differs from a natural person, and in this, especially the manner in which it can sue and be sued, it is substantially within the meaning of the law a citizen of the State which created it, and where its business is done, for all the
5 purposes of suing and being sued, &c.—(See 2 How. p. 555–9.

On the other hand, corporations are sometimes viewed, as above stated, in respect of the persons of which they are composed;

that is to say, the court will look behind the charter or act of incorporation to the individual persons and citizens of which the aggregate is constituted. (See the leading case of the bank of the U. S., *v.* Deveaux, 5 Cranch 61, *et seg.*) In that case, Chief Justice Marshall said: "That corporations composed of citizens are considered by the legislature as citizens under certain circumstances, is strongly to be inferred from the regeristing act. It never could be intended that an American registered vessel, abandoned to an insurance company, composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation;" and the court accordingly held, that although a corporation could not be considered a citizen in the full sense of that word, yet, that for the purpose of the suit, it was competent to look behind the corporate name to the individual citizens composing the association, and to assume jurisdiction because of their rights as citizens.

In The Lexington Manufacturing Company *vs.* Sullivan, the Supreme Court of Kentucky said: "It is contended that a corporation, let the members be or be not citizens, cannot itself be a citizen, within
6 the meaning of the law. Could this doctrine be maintained, it would be conclusive against this suit in toto. But from an examination of the authorities, it will appear that whenever it becomes necessary for the purpose of justice, courts will look into the character of the individuals who compose the corporation, and give to the institution the privileges of the members who compose it, and that if those members can individually sue in a court by right of citizenship, so may the body to which they belong," 2 Litt. 256, 257; and see The Society, &c., *vs.* Wheeler, 2 Gall. 133, The Society, &c., *v.* New Haven, 8 Wheat. 491; Ohio & Miss. R. R. Co., *v.* Cox, 1 Black, 286, which last case seems to settle the principle. For the purposes of this case, it is quite immaterial, whether in accordance with Louisville R. R. Co. *vs.* Letser, 2 How., and Marshall *v.* Bal. & Ohio R. R. Co. 16 How., above cited, a corporation be regarded for the purposes of its character as a citizen in contemplation of law, or whether in accordance with the Bank of the U. S. *v.* Deveaux, 5 Cr. 61, and the earlier and later cases, it be held that a corporation is not a citizen, but that for the purposes of its character, it is competent to look behind the charter to the individual citizens composing the corporate body. Upon the first supposition the Insurance Companies themselves, in their corporate capacity, and upon the second supposition the [the] individual citizens of New York or other States composing those companies, are entitled in the State of Virginia, in respect of their business of insur-
ance, a lawful business, incident and indispensable to success-
7 ful trade and commerce, to all the privileges and immunities of citizens of Virginia engaged in the same business, whether in the form of incorporated companies or as single individuals. If so, they can make contracts in Virginia, in and about their business, by their agents or otherwise, to be performed in Virginia, New York, or elsewhere, upon the same terms as to the State government of Virgi-

nia, as the citizens of the State itself, and no additional or other burdens or restrictions can be imposed directly upon them, or indirectly, through their agents, than are imposed upon the citizens of Virginia and their agents doing the same business, since the same privileges and immunities are guaranteed by the Constitution equally to all.

In speaking of this important constitutional provision, Mr. Webster said on a memorable occasion, before the Supreme Court of the United States, after tracing and expounding the history of the clause:

"That this article in the Constitution does not confer on the citizens of each State political rights in every other State admitted. A citizen of Pennsylvania cannot go into Virginia and vote at an election in that State; though when he has acquired a residence in Virginia, and is otherwise qualified as required by her constitution, he becomes, without formal adoption, as a citizen of Virginia, a citizen of that State, politically. But for the purpose of trade, commerce, buying and selling, it is evidently not in the power of any State to impose any hindrance or embarrassment, or lay any excise toll,
8 duty, or exclusion upon citizens of other States, to place them, coming there, upon a different footing from her own citizens.

"There is one provision, then, of the Constitution, by which citizens of one State may trade with another without hindrance or embarrassment.

"There is another provision of the Constitution by which citizens of one State are entitled to sue citizens of any other State in the courts of the United States. This is very plain and clear, right under the Constitution; but it is not more clear than the preceding.

"Here, then, are two distinct provisions conferring power upon citizens of Pennsylvania and other States, as to what they may do in Alabama or any other State; citizens of other States may trade in Alabama in whatsoever is lawful to citizens of Alabama; and if, in the course of their dealings, they have claims on the citizens of Alabama, they may sue in Alabama, in the courts of the United States.

"This is American constitutional law, independent of all comity whatever. By the decision of this court, (S. C. U. S.,) it has been settled that this right to sue is a right which may be exercised in the name of a corporation. Here is one of their rights, then, which may be exercised in Alabama by citizens of another State in the name of a corporation. If citizens of Pennsylvania can exercise in Alabama the right to sue in the name of a corporation, what hinders them from exercising in the same manner this other constitutional right, the right to trade? If it be the established right of persons in Pennsylvania to sue in Alabama in the name of a corporation, why may they not do any other lawful act in the name of a corporation? If
9 no reason to the contrary can be given, then the law in the one case is the law in the other case."

It is this great constitutional right of freedom and equality, in trade, in and among the several States, by and between the citizens thereof, which has been so strikingly invaded in this case.

The business of insurance is a lawful and useful business. It is the

necessary handmaid of commerce everywhere, and in all its departments. There is nothing in the laws, or in the policy of Virginia or any other State against it. All the citizens of Virginia are free to engage, or they are free to engage in it individually, even without a license; and they may employ agents to aid them in carrying it on; nor is there anything in laws or policy of the State against that business being done by the general or special partnerships, or by incorporated companies which, in the language of Mr. Webster, "are but forms of special partnerships." There is, therefore, no objection to the business itself. It is useful and beneficial, and there is no objection to the form in which it is carried on. Indeed, many of the most necessary and useful departments of business, and all of the greater and more important enterprises of commerce, in its largest sense of commercial intercourse, and of social and religious advancement, are carried on in the same form. To quote more fully the words of the great lawyer and constitutional jurist above cited, "After all that has been said in
10 argument about corporations, they are but forms of special partnership, in some of which the partners are severally liable. The whole end and aim of most of them, as with us, is to concentrate the means of small capitalists in a form in which they can be used to advantage."

It is clear, therefore, that the State of Virginia neither makes nor can make objection to the business of insurance itself, nor to the associated form in which it is carried on by the principals of your petitioner. Nay, by the acts of Assembly complained of, both the business itself, in the form in which it is conducted by said companies, are expressly recognized and sanctioned. But onerous conditions are imposed upon citizens of other States engaged in that business which are not imposed upon citizens of Virginia engaged in the same business in the same form.

"The citizens of each State shall be entitled to the privileges and immunities of citizens in the several States." Is such legislation compatible with that great constitional provision, declared by Judge Story to have been intended to confer on the citizens of the several States "a general citizenship" throughout the Union, and by Mr. Hamilton, to be the very "basis of the Union?"

It is said, however, that under this provision of the Constitution, the citizens of another State are not entitled to trade or make contracts in this State in the name of a corporation authorized by the laws of their own State, because to give that construction to the clause would be to greater privileges and immunities to those citizens than to
our own, inasmuch as corporate contracts imply no individual
11 liability on the part of the citizens composing the corporation while for individuals contracts the individuals estates of our citizens are liable.

If there were assumed by such corporation a power to compel our citizens to trade or make contracts with it, there might appear some plausibility in this view. But no such power is assumed. Contracts with such a corporate body of our fellow citizens of a sister State are made at our own option and for our own benefit; and as individual

citizens have the right to make contracts with each other, as they may deem proper, upon the basis of limited contingent, or absolute liability, no reason is perceived why that privilege should not be exercised by a combination of citizens contracting with an individual or by an individual contracting with a combination of citizens, Besides, if the argument proves any thing, it proves too much and demonstrates its own absurdity. The different States have enacted different exemption laws, exempting the individual estates of debtors from execution on judgments for debt. Has any one State the constitutional right to enact that the citizens of other States shall not make contracts with her citizens within her borders, unless the exemption laws of those States shall exempt from execution the same amount of individual property as her own laws, upon the ground that unless there be such an exact equality of individual liability and lien for the enforcement and security of contracts, there is no equality of "privileges and immunities" between the citizens of those States and her own?

The simple and conclusive answer to this whole view is that
12 subject to the exclusive regulation of Congress, the citizens of the several States have a clear and absolute constitutional right to hold commerce and commercial intercourse, and make contracts inter sese upon such terms and conditions of individual associated, limited contingent, or absolute liability, as their several interests and inclinations may dictate, free and exempt from any interference or control of State legislation.

And this leads us to consider the subject in connection with another great and most important principle and provision of the Constitution of the United States, which seems to have been strangely overlooked by the State courts having under adjudication acts of a similar character to the legislation in question. By art. 1, § VIII, clause 3, power is granted to Congress "to regulate commerce with foreign nations, and among the several States, and with the Indians tribes," and by clause 18, of same section, power is granted to make all laws which shall be necessary and proper to carry into effect the said power, and all others vested by the Constitution in the general government. The extent and effect of these two powers have been fully considered by the Supreme Court of the United States, the first in Gibbons *vs.* Ogden. 4, Wheat. 1 and Brown *vs.* The State of Maryland 12, Wheat. 445 *et seq.*, and the second in McCulloch *vs.* The State of Maryland 4, Wheat. 316. In Gibbons *vs.* Ogden, Brown *vs.* The State of Maryland, it was decided, after argument of great ability, that the power to "regulate commerce" extends to every species of commerce and commercial intercourse between the United States and foreign nations and among the several States; that the word "com-
merce" as used in the Constitution is a unit, and that no
13 sort of trade or commercial intercourse can be carried on among the States to which the power does not extend; that while the power does not extend to commerce which is completely internal within a State, it fully and broadly applies apply to all commerce and commercial intercourse among, or by and between the

citizens of the several States with each other; that this power, "like all others vested in Congress, is complete in itself, and has no limitations but such as are prescribed in the Constitution," and that it is vested exclusively in Congress, and no part of it can be exercised by a State. And by the case of McCulloch *vs.* The State of Maryland, it was decided that the power to pass all laws necessary and proper to carry into effect the powers expressly granted, implies and embraces the power of Congress to select the means appropriate to execute and effectuate these powers.

Under these authoritative expositions of the Constitution, the whole subject of the regulation of commerce and commercial intercourse among the citizens of the several States is placed exclusively, fully, and completely within the jurisdiction of Congress, and no State has any authority to pass any law abridging or impairing in any way the constitutional rights either of its own citizens, or of the citizens of other States, of perfect freedom and equality in respect thereto. Congress has enacted no law touching commerce between the citizens of the several States, or the contracts by which trade may be carried on.

It has not exercised its power to regulate commercial intercourse and negotiation, or the terms and conditions of liability, indi-
14 vidual or associated, among the people of the different sections of the country in their contracts with each other, who, for all the purposes of commerce and commercial contracts, are one people, governed by one common and supreme law. The subject, therefore, is left free, to be controlled by the Constitution itself ; the absence of regulation is regulation (Gibbons *vs.* Ogden), and as by that instrument no limits, restrictions, or conditions, are imposed upon inter-state commerce, none such exist, and the constitutional equality and freedom of contract is the only rule.

If Congress had thought proper, it might clearly have enacted, that the citizens of the several States should trade and contract with each other individually, and not in partnership, or associations of any kind ; and also that in any commercial transaction between them, the property of each should be wholly bound for the fulfilment of the contract, irrespective of State exceptions ; or, Congress might have enacted that it should be lawful for the citizens of the several States to trade and deal with each other only upon the basis of restricted individual liability, or of associated and limited liability, or upon any other terms and conditions that might be thought necessary and proper in the legitimate regulation of commerce.

But the national legislature not having thought proper to pass any law upon the subject, perfect freedom must therefore exist among the citizens of the different parts of the Union, to contract with each other upon any basis of individual liability they may choose, and whether singly or in associations authorized by
15 general, or special laws, of the several States. It is their own business under the Constitution and laws of the United States, of which they are citizens, to deal with each other, in respect of the legitimate subjects of commerce, upon such terms and conditions as

may be mutually satisfactory to them ; and it is not in the power of any State legislature to prohibit them from so doing, or to impose restrictions, limitations or conditions of any character upon the contracts so made, much less to destroy or impair their legal validity, or inflict penalties upon the parties thereto or their agents for making the same.

Of all the departments of commerce, in its largest constitutional sense, the business of insurance as has been seen, is a common and neeessary ingredient and concomitant ; while itself an integral part of commerce, it is the guarantee and safeguard of all other commercial transactions. Without it, modern commerce could not exist, and trade and commercial intercourse in every form and variety of contract and relation, have reached their present condition of prosperous activity and magnitude throughout the Union and the world, because of the beneficent all-protecting contract of insurance.

If Congress has complete and exclusive power in the premises, and if contracts of insurance on the adventures of commerce in all its departments, and upon the buildings, instruments and material means by which it is conducted, be a most useful and necessary part of commerce itself, upon which, indeed, all the rest is in some
16 sort dependent, by what pretence can any State Legislature presume to interfere in the matter, and prescribe conditions on which alone contracts of this kind shall be made between its citizens and those of other States, and declare them to be void unless made with certain legal remedies attached thereto?

In Gibbons *vs.* Ogden, it was held, that the legislature of New York could not confer upon the citizens of that State the exclusive right to navigate the Hudson river by steam, because navigation is a part of commerce, and the regulation of commerce is vested exclusively in Congress. If New York could not exclude a single citizen of New Jersey, could it have excluded any number of citizens of that State in whatever form of contract they were associated, for the purpose of navigating the Hudson. So the State of Virginia could not prevent the citizens of New York from engaging in the free navigation of the James River to Richmond. Could it prevent the New York Steamship Navigation Company—a corporation composed of citizens of that State—from so doing? Could it prevent that company from purchasing necessary ship supplies in Richmond, or from renting wharves or erecting building for its business, or from making contracts for freight or taking and giving receipts for its delivery? Could the State prohibit the employment of agents here, requisite for the conduct of their business in New York? Could it impose burdens and restrictions upon the business of navigation carried on by citizens of New York incorporated for the purpose, which it did not impose upon its own citizens engaged in the same business in the same manner? Could it impose any burdens or restrictions at all upon the business of navigation between the two States of Virginia and New York carried on by their citizens, dealing with each
17 other in whatever form of contract known to commerce? It would require a great degree of hardihood to answer any of

these questions in the affirmative. Yet navigation is no more a part of commerce, and hardly a more essential part, than the ubiquitous contract of insurance, which is an inseparable accompaniment of all its adventures and all the means and instruments by which they are made—which protects ship and cargo alike through fire and flood; which begins with the consignment in one State and follows it to its safe delivery in another, however distant, and through how many soever intermediate States it may pass; covering the warehouse at the one end, and the other of the transit, and furnishing a proof against peril of all the elements of nature that endanger the above and operations of men, on land and sea.

Again, since the citizens of Virginia have the constitutional right of free and equal trade with the citizens of all the other States, could the State of Georgia, or Alabama, prohibit the Manchester Cotton Manufacturing Company from buying cotton in Savannah or Mobile? or from making contracts there for its shipment and insurance to Richmond? Could the State Government of Pennsylvania prohibit the Virginia Central R. R. Company or the City of Richmond, from buying coal, or railroad iron, in that State, from its citizens, or prevent its citizens, in whatever form of contract associated, from selling those articles to individual citizens of Virginia, or to citizens of Virginia, associated under her laws, whether for railroad, municipal or other legitimate purposes?

Contracts in cases of this character must often necessarily be made; if at all, in States other than those under whose laws the corporate association is formed, and must also necessarily be made by agents. A great part indeed, of the commerce among the States in articles of prime necessity and general use, is carried on by means of the associated wealth, skill, and labor of citizens incorporated into companies for the purposes of manufacture, trade and navigation, and acting through agents everywhere. The contracts of corporations formed for these purposes, stand upon the same footing as the contracts of corporations formed for the purposes of insurance; and the business of insurance covers all these transactions, as well as innumerable others of individual adventure. And to hold that any State can prohibit, or unequally tax, or lay oppressive burdens upon those transactions, negotiated within its borders by agents, or by direct communication with its citizens, there or elsewhere, because the contract is made by or on behalf of a lawful business association of citizens of another State, instead of an individual citizen, is not merely to assume the great power to regulate commerce, which is vested exclusively in Congress, but to do so upon a legal fiction, having no foundation either in reason or in the Constitution of the United States, and in so doing, to destroy the basis of a large and important part of the commerce existing between the citizens of the several States. Such legislation is doubly unconstitutional. It is unconstitutional as to the citizens of the States whom it excludes, or discriminates against. It is equally so as to the citizens of the State itself, whose rights freely to make contracts and hold every species of commercial intercourse with their fellow citizens of

18

the other States; is one of the most valuable of all the beneficent rights guaranteed by the Constitution which is the supreme
19 law of the Union. It is respectfully, but most earnestly, insisted that, within the sphere of legitimate commerce, it is not for any State to say what sort of contracts its citizens shall or shall not make with the citizens of the other States.

If the subject-matter be in itself unobjectionable, if it be such a contract especially as the citizens of the particular State may make with each other, there is no power but Congress which can prohibit, or tax or touch a similar contract between a citizen of one State and a citizen or combination of citizens of another State, whatever may be the form in which the latter may agree to bind themselves, or the extent and character of the obligations they may choose to assume. The citizens of Virginia have a constitutional right to contract in Virginia, as well as in New York, with the citizens of New York; and citizens of New York have a constitutional right to be contracted with in Virginia by the citizens of Virginia, in respect of the ordinary and legitimate subjects of commerce, whether the citizens of New York on their part agree to bind themselves individually, or collectively, or absolutely, or conditionally, or whether a whole, or a part of their individual estates, or none at all, be pledged for the peformance of the contract; and if this be true, it is obvious that it can be a matter of no importance where the contract is made, or whether made by direct or fiduciary communication. If the foregoing views be correct, it is too plain for explanation or argument that the said act of assembly complained of is unconstitutional and void.

For these and other errors apparent upon the face of said
20 record, your petitioner prays that a writ of supersedeas may be awarded to said judgment, and that the same may be reversed and set aside; and your petitioner will ever pray, &c.

SAMUEL B. PAUL,
*By Counsel.*

I am respectfully of opinion that the judgment complained of in the foregoing petition should be reviewed.

JOHN HOWARD,
*Counsel practicing in the Supreme Court of Appeals of Va.*

Richmond, Aug., 1866.

21 VIRGINIA:

At a Circuit Court held for the city of Petersburg, at the court-house thereof, on the 5th day of June, 1866:

Be it remembered, that at this same term, to wit, at a Circuit Court held for said city, on the 23d day of May, 1866, Daniel Lyon, foreman, Wm. Pannill, John Rowlett, W. S. Harrison, Wm. Weddell, Lewis F. Hicks, Joseph E. Venable, John Y. Russell, James Ayres, Charles A. Scott, R. A. Hamilton, J. Andrew White, George Z. Scott, Joseph Cockrell, R. A. Young, James Chieves, and D. B. Tennant, grand jurors for the body of this city, this day appeared in pursuance

of their adjournment, and being called over, retired to their room, and after some time spent therein returned into court and made the following presentment:

"They present Samuel B. Paul, of this city, for a misdemeanor by him committed, in this: That he did, on the first day of May, 1866, in this city, without a license authorized by law, act as agent for the Germania, Hanover, Niagara, and Republic Insurance Companies, created and incorporated in the State of New York; by then and there offering to insure for and on behalf of said companies; by proposing and offering to insure a policy of insurance. binding all of said companies, and commonly known as the underwriters' policy of insurance. All this within this city, within the last six months, and within the jurisdiction of this Court, upon the testimony of Isaac Smith, commissioner of the revenue, sent for by the grand
22 jury, and sworn in court to give testimony."

And now at this day, to wit, on Wednesday, the 5th day of June, 1866.

This day came the attorney for the Commonwealth and the defendant, in his own proper person, and by leave of the court the said Samuel B. Paul, with R. H. Mann, his security, entered into and acknowledged a bond in the penalty of $1,000, conditioned as required by the act of Assembly; and thereupon the said Paul pleaded not guilty to the presentment made against him: Wherupon came a jury, to wit: B. J. Rogers, A. N. Baudea, James Cutler, R. S. Eckles, R. F. Lester, E. B. Wells, James E. Collier, M. E. Kull, W. T. Hubbard, W. S. Simpson, jr., R. M. Poole, and E. B. Bain, who, being selected by ballot, tried and sworn, the truth of and upon the premises to speak, returned a special verdict, in the words and figures following to wit:

"We, the jury, find the following to be the facts of this case:

"That Samuel B. Paul, the defendant in this prosecution, a resident of Virginia, on the first day of May, 1866, in the city of Petersburg, Va., without a license authorized by law, did act as agent for the Germania, Hanover, Niagara, and Republic Insurance Companies, by then and there offering to insure for and on behalf of said commissioners, and offering to insure, and actually issuing a policy of insurance, commonly known as the underwriters' policy of insurance, to a citizen of Virginia; which said policy is in the words, letters, and figures following, to wit:

"$3,000.

No. 68

"*Underwriters' policy.*

"By this policy of insurance, the Germania Fire Insurance Company, the Hanover Fire Insurance Company, the Niagara Fire Insurance Company, and the Republic Fire Insurance Company, all of the City of New York, each acting and contracting for itself, and not one for the other or others, in consideration of one-fourth part of the sum of

dollars, to each of them paid by the assured hereinafter named, do each insure against loss or damage by fire, to the amount of one-fourth part of the sum of dollars, for the term of upon

"And each of the said companies agrees to make good to the assured executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured by such company as aforesaid, as shall happen by fire to the property above specified, from the day of 186 , at noon, to the day of 186 , at noon; the amount of such loss or damage to be estimated according to the actual cash value at the the time of the loss, and to be paid sixty days after due notice and proofs of the same, made by the assured, and received at the office of the general agency of the said companies in the city of New York, in accordance with the terms of this policy hereinafter mentioned; but, provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators, indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies respectively under this policy.

"And, provided further, that it shall be optional with the companies to repair, rebuild, or replace the property lost or damaged, with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within thirty days after receipt of proofs herein required; and in case the companies elect to rebuild, the assured shall, if required, furnish plan and specifications of the building destroyed. Neither of the companies shall be liable for loss by theft at or after a fire; nor for any loss or damage by fire caused by means of invasion, insurrection, riot, civil commotion, or military or usurped power; nor for the loss of bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, money, bullion, jewels, plate, watches, musical instruments (except one piano or melodeon, as part of the furniture of a dwelling house), nor for scientific instruments, ornaments, medals, patterns, printed music, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy; nor from fires in buildings unprovided with good and substantial stone or brick chimneys, nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for loss or damage caused by the falling of any building, or from any fire ensuing therefrom; nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance; nor by lightning, or the explosion of a steam boiler, unless fire ensues, and then for the loss or damage by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning; nor for loss or damage caused by removal of property from a building, except it be proved that such removal was necessary to preserve the property, in which case the damage shall be borne by the assured and by the companies respectively, in the proportions that the sum in-

sured by each bears to the whole value of the property insured. Plate-glass, in doors or windows, when the plates are of the dimensions of three square feet or more, also store furniture and fixtures, must be separately and specifically insured, otherwise they are not protected by this policy.

"If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupany of the property, or any omission to make known every fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in a written application or otherwise, or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the companies written hereon, or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever within the control of the assured, without the assent of the companies endorsed hereon, or if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, or if this policy shall be assigned, without the consent of the companies endorsed hereon, or if the premium shall be unpaid, or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy, or if the assured shall keep upon the said premises gunpowder, or phosphorus, or petroleum, or rock, or earth oils, or benzole, benzine, or naptha, or any explosive substances, or shall keep or use upon the said premises camphene, spirit gas, or chemical oils, without written permission in this policy, then, and in every such case, this policy shall be void; provided, however, that without such written permission the assured may keep upon the said premises for sale, not exceeding, twenty-five pounds of gunpower, if the same be kept in close tin canisters, and be sold only by daylight; and that he may also keep for sale or use upon the said premises. not exceeding, one barrel of petroleum or coal-oil. And if, in the opinion of the companies, an over-insurance exists, or shall be hereafter made on the property hereby insured, or the risk be increased by any means, or if for any other cause the companies shall so elect, they respectively reserve to themselves the right of canceling this policy, so far as they are respectively concerned, by paying to the assured the unexpired premium pro rata. Insurance once made may be continued for a further term, the premium therefor being paid and a renewal receipt given for the same, and it shall be considered as continued under the original representation; but in case there shall have been any change in the risk, either within itself or by adjacent buildings, not made known to the companies by the assured at the time of renewal, this policy and renewal shall be void. If the interest of the assured in the property be any other than the entire,

unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the companies, and so expressed in the written part of this policy, otherwise the policy shall be void.

"In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of the companies respectively no greater proportion of the loss sustained than the sum hereby insured by each of them bears to the whole amount insured thereon, whether such other insuranee be by specific or by general or floating policies.

"In case of loss, the assured shall use their best endeavors in saving and protecting the property from damage at and after the fire; if they shall fail so to do, the companies will not be liable for damage caused by such failure; and there can be no abandonment to the companies of the property insured. The assured shall forthwith give notice of said loss to the companies, through their general agent in the city of New York, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any, and what other insurance, has been made on the same property, giving copies of the written portion of all policies thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used, when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds (nearest the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify. And the assured shall, if required, submit to an examination under oath by any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe to such examinations when reduced to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the companies. Damage to property not totally destroyed shall be appraised by disinterested men, mutually chosen by the assured and the companies; and the companies reserve the right to take the articles damaged at their appraised value. When personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers, in writing, shall form a part of the

proofs hereby required; one-half the appraisers' fees to be paid by the companies. In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein, certified to by them. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. And until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy.

"Re-insurance, if hereby made for any other insurance company, to be on a basis of such a liability that, in the event of loss, these companies are each to pay only their respective portions of said loss, pro rata, with said other company, as the amount re-insured bears to the whole amount insured by such other company.

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against either of these companies for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

"It is further understood and agreed, by and between the parties hereto, that nothing herein contained shall be construed as creating or importing any joint liability on the part of the above-named companies, or either of them, but that each of the said companies shall be regarded as only severally liable upon this policy for the amount insured by each under the same, in the same manner, and not otherwise, as if each had issued its separate policy for the proportionate amount which each insures as above mentioned. And if any additional amount shall be endorsed upon this policy, it is to be with the understanding that the said companies each become insurers only for one-fourth of such additional amount.

"It is further understood that the taker or holder of this policy shall not participate in the profits of either of the said companies.

"This policy is made and accepted upon the above express conditions, but the same shall not be valid unless countersigned by the duly authorized agent of said companies at Petersburg, Va.

"In witness whereof, the said companies have respectively caused

these presents to be signed by their respective presidents, and attested by their respective secretaries, in the city of New York.

" W. HILGER, *President*,
" JOHN W. W. DWIGHT, *Secretary*,
" *The Germania Fire Insurance Company.*
" DAVIS T. LORME, *President*,
" B. S. WALCOTT, *Secretary*,
" *The Hanover Fire Insurance Company.*
" JONATHAN D. STEELE, *President*,
" P. NOTMAN, *Secretary*,
" *The Nigara Fire Insurance Company.*
" ROB'T S. HOWE, *President*,
" D. J. CURRY, *Secretary*,
" *The Republic Fire Insurance Company.*

"Countersigned by the agent of the above-named companies, this day of 186 .

*Agent.*

"Endorsed: The insurance companies within named hereby consent that the interest of , in the within policy be assigned to , subject to all the terms and conditions therein mentioned and set forth.

" Dated at the day of , 18 .

*Agent.*

"For value received, hereby assign, transfer, and set over to all right, title, and interest in and to the within policy, and all benefit and advantage to be derived therefrom.

"Dated at the day of , 18 .

" Witness,

23 "That the Germania, Hanover, Niagara, and Republic Insurance Companies aforesaid, were at the time aforesaid, and are now, foreign insurance companies, each and severally incorporated in the State of New York, under the laws of said State of New York, to carry on the general business of insurance against fire. That said companies were each duly organized under their several charters or acts of incorporation, and that the corporaters of each of said companies were, at the time and are, citizens of the State of New York, or citizens of States of the United States, other than the State of Virginia. That the said companies, before the offer to insure the underwriters' policy of insurance aforesaid, and the actual issue of the same, agreed among themselves to issue policies of insurance in the form hereinbefore set forth, and that said companies have been, and are, carrying on the fire insurance business in the State of New York and elsewhere, under policies of the form aforesaid. That the said defendant, Samuel B. Paul, was on the day and year aforesaid the agent and attorney in fact of said companies, in and for the said

city of Petersburg, and had then filed with the auditor of public accounts of the State of Virginia, as required by law, his written power-of-attorney as such, duly executed, certified and authenticated according to law. That the said defendant, Samuel B. Paul, previous to the time when he acted as agent of the said insurance companies, as aforesaid, had made to the commissioner of the
24 revenue of the city of Petersburg, in the State of Virginia, the proper officer of said State, in said city, a demand or request for a license or licenses to act as agent in said city for said companies in carrying on the business of fire insurance in said city, and had offered to comply with all the requirements of the statutes of said State of Virginia, respecting foreign insurance companies, including a tender in lawful money of the amount of said license tax, save and except so much of the provisions of sections first and second of the act of assembly, passed on the 3d day of February, 1866, entitled "An act to require a deposit of securities to be made by foreign insurance companies doing business in this State," as required the deposit with the treasurer of the State of certain bonds, and requiring the exhibition by such agent to the commissioner of the revenue, of the treasurer's receipt for the bonds required to be deposited with him, which said sections of said act are in the words, letters, and figures following, to wit:

"1. Be it enacted by the general assembly, that no insurance company which has not been incorporated under the laws of the State of Virginia, shall carry on its business in this State without obtaining a license to transact its business in the manner prescribed by law; and no such company shall receive such license until it has deposited with the treasurer of the State six per centum bonds of the State of Virginia, or other bonds of public corporations
25 guaranteed by the State, or bonds of individuals, residents of the State, executed for money loaned or debts contracted after the passage of this act, bearing not less than six per centum per annum interest, to the amount following, to wit: If the capital of the said company does not exceed five hundred thousand dollars, it shall deposit thirty thousand dollars of said bonds; if the capital of the company is over five hundred thousand dollars, and does not exceed one million of dollars, it shall deposit thirty-five thousand dollars; and for every additional million of dollars, or a fraction thereof, it shall deposit an additional five thousand dollars of said bonds, but no company shall be acquired to deposit more than fifty thousand dollars of said bonds.

"2. Any such company desiring to carry on the business of insurance shall, by an agent employed to superintend or manage its business in this State, deliver, under oath, to the treasurer a statement of the amount of the capital of said company, and make with him the deposit of bonds so prescribed in the preceeding section, or without the oath, may deposit fifty thousand dollars of said bonds; but the bonds so deposited shall not be in sums exceeding five thousand dollars, and the treasurer shall thereupon give to said agent a receipt for the same; and upon the exhibition of the said receipt to a

commissioner of the revenue of the county or corporation in which an office of said company in the State is, or is intended to
26 be, located, and having paid the specific license tax which may be imposed thereon, a license shall be issued in the manner provided by law to said company, to carry on its business; and if at the end of the period for which a license is given, the said company shall desire another license, it shall only be given on the certificate of the treasurer that the bond required by this act to be deposited with him are in his possession.

"That the said commissioner of the revenue, when said demand and request for a license or licenses aforesaid, accompanied by the tender of payment of the tax on said license or license was made by the defendant, Samuel B. Paul, refused to issue and deliver to him said license or licenses, because of his failure to produce and exhibit to said commissioner of the revenue the receipt of the treasurer specified in section second of said act, and for this reason only.

"That the 47th section of the act of assembly, passed Feb'y 13th, 1866, entitled 'An act amending the 38th chapter of the code, (edition of 1860) in relation to the assessment of arears on licenses,' is in the words, letters, and figures following, to wit: 'No person shall, without a license authorized by law, act as agent for any foreign insurance company; any person offering to insure, or who makes any contract or policy of insurance, for or on behalf of any company created or incorporated elsewhere than by or in this State, shall be regarded as on agent of a foreign insurance company; any person acting as above as an agent of any such foreign insurance
27 company shall pay a fine of not less than fifty dollars, nor more than five hundred dollars for each offence.'

"That the 51st section of the said last mentioned act of assembly is in the the words, letters, and figures following, to wit:

"'It shall be the duty of every person who is engaged, or desire to engage, in any business, employment, or profession, for the prosecution of which a license is required, to apply to the commissioner of the revenue of the district, where the business. employment, or profession is to be prosecuted, for an assessment of the tax imposed by law on the license he desires to obtain. It shall thereupon be the duty of the commissioner to administer the oath required by this act, and deliver to such person a certificate, showing the business, employment, or profession which may be pursued; the place at which the same may be prosecuted, and the amount of tax to be paid by such person for the licensed privilege. The certificate so issued by the commissioner shall be produced to the sheriff or other officer authorized to collect the property tax in the county or corporation, wherein the certificate was issued. And it shall be the duty of the sheriff or other officer to receive the taxes named therein, and grant to such person a receipt for the taxes written upon such certificate, such certificate and receipt, made in conformity to law, shall be held to be a license to prosecute the business, employment, or profession named therein, except in such cases as the law requires a further certificate and approval of the county or corporation court, in which latter

28 case the certificate of the commissioner, the payment of the tax, and the approval of the court shall be obtained before the business, employment, or profession shall be held to be licensed. It shall be the duty of every commissioner of the revenue of a county to attend at, and remain during the continuance of, the sessions of the county courts in March and April, at the court-house, to issue certificates of licenses provided for in this section.'

"That by the laws of Virginia no corporation created by the State, with liberty to do the business of insurance, is required to make any such deposit as aforesaid with any office of the commonwealth, or any deposit of any kind whatever, and the business of insurance is a privilege and immunity of all resident citizens of the State of Virginia, without requirement of any deposit any kind whatever, with the commonwealth or any officer thereof; that the said Samuel B. Paul, and the said insurance companies, all and severally, have never complied with the provisions of sections 1st and 2nd of the act of assembly, passed Feb'y 3d, 1866, hereinbefore set forth, but have heretofore refused, and still refuse, to do so.

"If, upon this state of facts, the court shall be of opinion that the law is in favor of the commonwealth, then we find the defendant guilty, and assess his fine at $50 00; but if the court shall be of opinion that that the law is in favor of the defendant, then we find the defendant not guilty.

"M. E. KULL."

And thereupon the matters of law arising upon the special verdict in this cause being argued, it seems to the court here
29 that the law is with the commonwealth. Therefore, it is considered by the court that the commonwealth of Virginia, for the benefit of the literary fund, recover against the said defendant the sum of fifty dollars, the fine by the jurors in their verdict assessed, and her costs by her in this prosecution expended. And the defendant by his counsel stating that he desired to apply for a writ of error to the said judgment, the court doth suspend the execution of said judgment for sixty days to allow him time to make application [to make application] for the said writ of error; but he shall not have the benefit of the order suspending the execution of this judgment, unless he shall within sixty days give bond, with approved security before the clerk of this court, in the penalty of $200, reciting the judgment and the intention of the defendant to present his petition for such writ of error, and providing for the payment of said judgment, and all such damages as may be sustained by reason of the said suspension, in case a writ of error should not be allowed and be effectual within the said sixty days.

The bond, referred to in the first part of the foregoing order, is in the words, letters and figures, to wit :

"Know all men by these presents, that we, Samuel B. Paul and Robert H. Mann, are held and firmly bound unto the commonwealth of Virginia in the just and full sum of one thousand dollars, current money of Virginia, to the payment whereof, well and truly to be made,

we bind ourselves, our heirs, executors, and administrators,
30 jointly and severally, firmly by thes presents. Sealed with our seals, and dated this 3d day of June, A. D. 1866.

"The condition of the above obligation is such, that if the above bound Samuel B. Paul shall appear before the judge of the circuit court of said city, on this day, to answer a presentment of the grand jury, made against him on the 23d May, 1866, for a misdemeanor by him committed, in this; that he did on the first day of May, 1866, in this city, without a license authorized by law, act as agent for the Germania, Hanover, Niagara and Republic Insurance Companies, foreign insurance companies, created and incorporated in the State of New York, by then and there offering to insure for and on behalf of said companies, by proposing and offering to insure a policy of insurance binding all of said companies, and commonly known as the underwriters' policy of insurance, and shall abide by and satisfy the judgment which may be rendered in the prosecution thereof, then the above obligation to be void or else to remain in full force and effect.

"[SEAL.] SAML. B. PAUL.
"[SEAL.] R. H. MANN."

STATE OF VIRGINIA, *City of Petersburg, to wit:*

I, Edwin M. Mann, clerk of the circuit court for said city, in the State aforesaid, do hereby certify that the foregoing is a true transcript from the records of the said court.

Given under my hand this 14th day of June, 1866.

EDWIN M. MANN, *Clerk.*

31 VIRGINIA:

At a supreme court of appeals, held at the Capitol, in the city of Richmond, on Friday, October 12th, 1866.

The petition of Samuel B. Paul for a writ of supersedeas to a judgment recovered against him by the commonwealth, in the Circuit Court of the city of Petersburg, on the fifth day of June, 1866, having been maturely considered, and the transcript of the record of the said judgment seen and inspected, the court being of opinion that the said judgment is plainly right, doth deny the said writ of supersedeas.

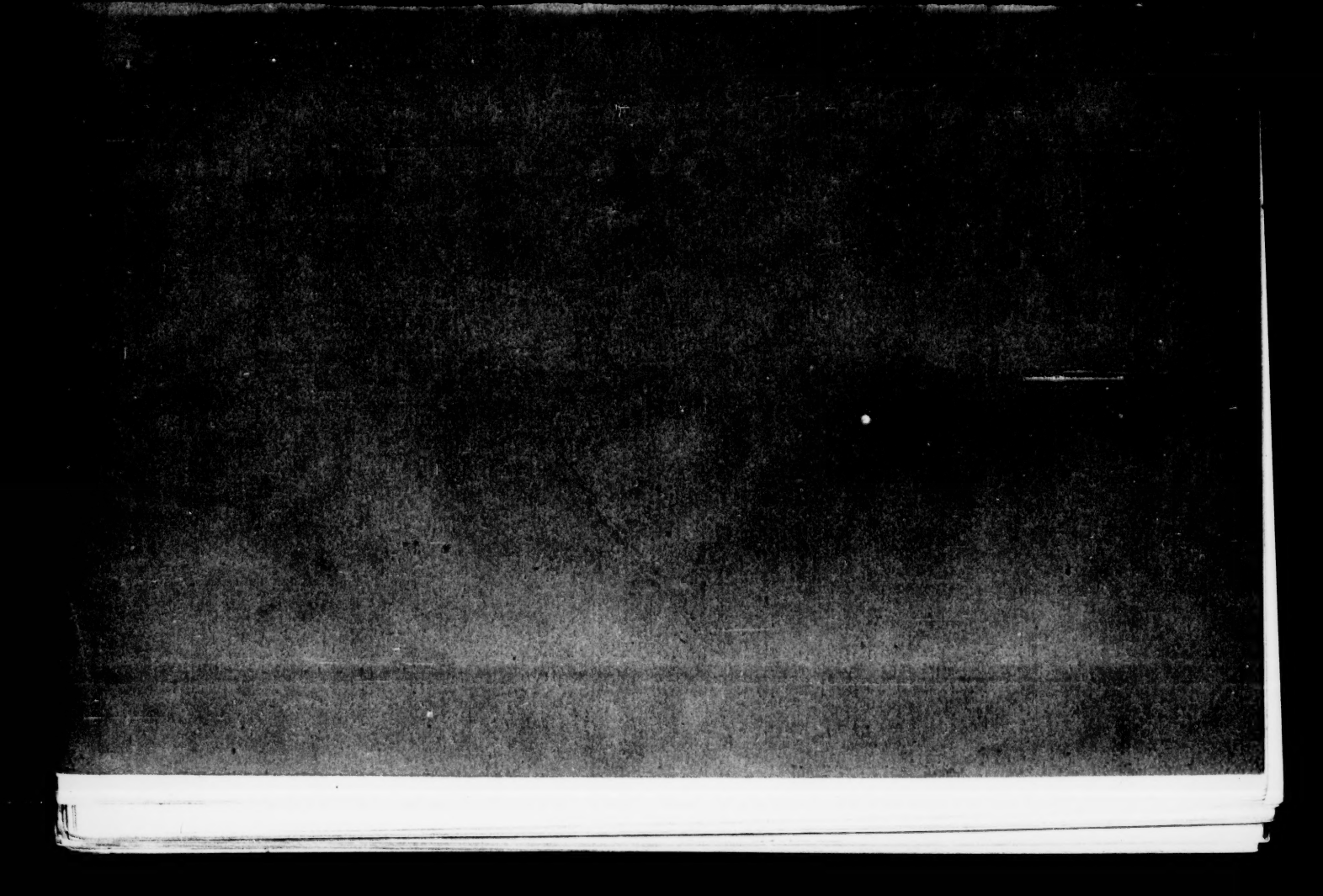
STATE OF VIRGINIA, *City of Richmond, to wit:*

I, M. T. Starke, clerk of the supreme court of appeals of Virginia, do hereby certify that the foregoing is a true transcript from the records of the said court.

Given under my hand this 28th day of November, 1866.

[There being no seal of court.]

M. T. STARKE, *C. C.*



139

# Supreme Court of the United States.

## DECEMBER TERM, 1868.

SAMUEL B. PAUL

vs.

THE COMMONWEALTH OF VIRGINIA.

**BRIEF FOR PLAINTIFF IN ERROR.**

J. M. CARLISLE,
J. D. McPHERSON,
*For Plaintiff in Error.*

Washington:
INTELLIGENCER PRINTING HOUSE,
401 and 403 D Street, near 7th.
1869.

# Supreme Court of the United States.

DECEMBER TERM,—1868.

SAMUEL B. PAUL
vs.
THE COMMONWEALTH OF VIRGINIA. } No. 139.

## Brief for Plaintiff in Error.

This case is brought up by writ of error to the Supreme Court of Appeals of the Commonwealth of Virginia, under the 25 setion of the Judiciary act.

### The Case,

in matter of fact, appears in the form of a special verdict at pp. 14 to 22 of the record. It shows, in substance, as follows:

That the plaintiff in error, a resident of the State of Virginia, was the agent of certain Insurance Companies, "in "corporated in the State of New York under the laws of the "said State of New York, to carry on the general business "of insurance against fire," * * * and the corpora- "tors of each of said companies were at the time, and are "citizens of the State of New York, or citizens of the "United States, other than the State of Virginia." Rec., p. 19.

That the business of such insurance is a lawful business, and may be carried on by all resident citizens of Virginia, and all corporations created by the State, without requirement of any deposit of any kind whatever with any officer of the State, upon obtaining the usual license.

But by a statute of the State of Virginia of February 3, 1866, it is enacted: That no insurance company, which has not been incorporated under the laws of the State of Virginia, shall carry on its business in this State until it shall have obtained a license, and that no license shall issue to such company until it shall have deposited with the Treasurer of the State 6 per cent. bonds of the State of Virginia, or guaranteed by the State or bonds of residents of Virginia, given for money loaned, to an amount varying from $35,000 to $50,000, according to the capital employed.

That by a statute of the State, passed February 3, 1866, it is provided, that no person shall "without a license authorized by law, act as agent for any foreign insurance company," under a penalty of not less than $50, and not more than $500.

That the plaintiff in error applied for a license to prosecute the business of insurance, as such agent, and tendered the specific license tax, which was refused only because the companies, whose agent he was, had not made the deposit required by the above cited statute.

That thereafter the plaintiff in error offered, and actually issued, to a citizen of Virginia, a policy of insurance, on behalf of the companies of which he was agent; for which violation of the said statute he was tried in the Circuit Court for the city of Petersburg, upon a presentment of the grand jury, and upon the special verdict set out in the record, was convicted and sentenced to pay the fine.

This judgment was affirmed by the Supreme Court of Appeals of the State, being the highest court to which said judgment could be carried by appeal.

The plaintiff in error rested his defence upon the following clauses of the Constitution of the United States, viz.: Art. IV, Sec. 2, providing that "the citizens of each State shall "be entitled to all the privileges and immunities of citizens "in the several States;" and Art. I, Sec. 8, giving Congress

power "to regulate commerce with foreign nations, and among the several States." Rec. p. 5.

And upon these provisions he maintained that the statute of the State of Virginia was unconstitutional and void, so far as it imposed special and discriminating restrictions upon the carrying on of the business of insurance by citizens of New York, in the State of Virginia. Rec. p. 4.

This defence having been denied him by the highest Court of the State the jurisdiction of this court seems undeniable.

The sing'e question therefore, to be now discussed is, whether under both or either of the clauses of the constitution cited., the act of the Legislature of Virginia in the particulars complained of, is unconstitutional and void.

## I

Such legislation was expressly forbidden by the articles of confederation, by which (article 4, Sec. 1) it is provided, that "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union the free inhabitants, &c., shall be entitled to all the privileges and immunities of free citizens in the several States * * * and the people of each State shall have free ingress and regress to and from any other State, *and shall enjoy therein all the privileges of trade and commerce subject to the same duties impositions and restrictions as the inhabitants thereof respectively.*" 1 Stat., p. 4.

## II

It cannot be supposed that the Constitution was intended to be less efficient in these respects than the articles of confederation had been. One of its great objects was to secure a more perfect Union. The defect in the article 4 of the confederation was not that it imposed too great restrictions upon the powers of the States, but that it was wholly without

the protection and support of a supreme federal power. The want of a power to regulate commerce, not only with foreign nations, but among the several States is stated by Story to have been "one of the leading defects of the confederation, and probably as much as any one cause conduced to the establishment of the Constitution."

Story, Com. Cons., Sec. 1053.

See also Federalist, Nos., 4–7–11–22.

Accordingly we find the whole subject covered by the two clauses above referred to. Article 4, guarantees to the citizens of each State all the privileges and immunities of citizens in the several States, omitting to specify such privileges as applying to trade and commerce, such specification being unnecesary, because the whole subject of commerce among the several States was expressly and exclusively granted to Congress by Article 1, Sec. 8.

Indeed, the words "privileges and immunities," in article 4, of the Constitution, have been held to include the right of exemption from any higher impositions than other citizens are liable to.

Corfield v. Coryell, 4 Wash., C. C. R. 371.

2 Kent Com., 72.

## III

That these provisions of the Virginia Statute are essentially and distinctly a regulation of commerce between Virginia and other States, can only be denied upon the idea that the business of insurance is not comprehended by the term commerce. For if this statute had prohibited a New York Merchant to sell wheat or flour, or a New England Manufacturing Company to sell its fabrics in the State of Virginia without having first, besides paying a license tax, deposited with the Treasurer of the State a large amount of bonds, no one would fail to see that it was a regulation of commerce among the States, and no one could pretend that

the citizens of New York or New England, upon whom these special burdens and restrictions were laid were not denied in the State of Virginia the privileges and immunities which were common to all the citizens of that State.

But the term commerce as used in the Constitution has been authoritatively construed to have a signification wide enough to induce all these subjects. In Gibbons vs. Ogden, 9 Wh., 189, Chief Justice Marshal said "commerce undoubtedly is traffic, but it is something more; it is intercourse. "It describes the commercial intercourse between nations, "and parts of nations in all its branches."

The contract of insurance is inseparable from any known system of commerce in civilized nations in modern times Marine insurance is so connected with commerce and navigation that it is drawn within the admiralty and maritime jurisdiction of the Federal Courts, and the insurance of goods in course of transportation on land, and in the merchants warehouse itself is what no prudent merchant omits. Indeed the right to sell merchandise and the right to insure it would seem in the nature of things to be inseparable. And so necessary an incident to commerce in its narrowest sense as the contract of insurance, must fall within the principles directly applicable to that commerce itself.

In Almy vs. California, 24 How., 169–174, Chief Justice Taney speaking of a tax on a bill of lading uses this language.

"A tax or duty on a bill of lading though differing in form from a tax on the article shipped is in substance the same thing," see that opinion *passim.*

And in the Bank of Augusta vs. Earle, 13 Pet., 590, "Agencies for corporations engaged in the business of insurance," are referred to as "usages of trade and commerce."

And if a New York Merchant has a right to establish an agency to sell his goods in Virginia, it would seem difficult to deny to that agent the right te effect an insurance there with New a York Company through its agent upon equally favorable terms as with a Virginia Company.

IV.

The power to levy a tax, or to impose a burden or restriction, however inconsiderable, necessarily involves the power absolutely to prohibit the thing so taxed or restricted. "The power to tax involves the power to destroy." McCulloch v. The State of Maryland, quoted by Mr. Justice Miller, in Crandall v. The State of Nevada, 6 Wall., 46, in which case he says that if the State could tax a railroad passenger one dollar, it could tax him a thousand, and so prevent or seriously burden all transportation of passengers from one part of the country to the other.

The power here claimed by the State of Virginia therefore, is the power to exclude all companies not incorporated by the State of Virginia from trade and commerce within that State. The language of the statute is not "*corporations*," but "*companies*"—i. e., partnerships or associations of natural persons, who are required to become incorporated by the State of Virginia, as a condition to participating in a commerce common to citizens of that State upon equal terms.

V.

But if the statute can be construed to apply only to an incorporated company, it comes to the same thing; for a corporation created by the laws of one of the States, and composed of citizens of that State, is a citizen of that State within the meaning of the constitution.

Louisville R. R. Co. v. Leston, 2 Howd., 497.

And such is the rule of international law.

Upon either construction of the statute, therefore, the claim of the State of Virginia is to the right to exclude citizens of other States from participating with her own citizens in the commerce of that State.

VI.

In no view of this statute can it be regarded as a police

regulation, or as otherwise falling within the most liberal scope of the reserved powers of the States. It concerns only the exercise of a business not only lawful and permitted, but encouraged, and by this statute attempted to be protected for its own citizens. It does not at all concern the manner or the circumstances of the exercise of that business, but only the persons who shall exercise it, and discriminates between them only in respect of their being citizens of the State of Virginia, or of other States in the Union,

If it be suggested that the State has the right in this manner to protect its citizens against unsubstantial or irresponsible corporations created by. other States, it may be answered that the same power and the same policy must exist in respect of partnerships of natural persons, citizens of other States, having their chief establishments there, in any other trade or commerce, and attempting to establish agencies in the State of Virginia.

VII.

If, as we maintain, the statute in qnestion is a regulation of commerce between Virginia and other States of the Union, it is upon a subject which must, in its nature, be exclusively Federal. It is plainly not one of those subjects upon which the States may legislate in the absence of legislation by Congress. It concerns nothing less than the equal right of the citizens of all the States to carry on a lawful trade or commerce in each State upon equal terms with the citizens thereof. Nothing can be more purely Federal in its nature, or more obviously beyond the reach of invidious State legislation.

VIII.

In addition to thc views here presented, we refer to the argument of the Plaintiff in error contained in the petition to the Court of Appeals of Virginia. (Record pp. 4 to 13.)

CONCLUSION.

Upon the whole, we submit that the judgment should be reversed.

J. M. CARLISLE,
J. D. McPHERSON,
*For Plaintiff in Error.*

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# SUPREME COURT OF THE UNITED STATES.

SAMUEL B. PAUL

vs.

THE COMMONWEALTH OF VIRGINIA.

*Upon a writ of error to the Supreme Court of the United States from a judgment of the Circuit Court of the City of Petersburg, in the State of Virginia.*

SAMUEL B. PAUL
vs.
THE COMMONWEALTH OF VIRGINIA.

*Upon a writ of error to the Supreme Court of the United States from a judgment of the Circuit Court of the City of Petersburg, in the State of Virginia.*

This case arose out of a presentment in circuit court of the city of Petersburg, in Virginia, against the appellant, Samuel B. Paul, of a misdemeanor. See the indictment. It is very short, contains but one count, and contains but one charge, to wit: "that he did, on the first day of May, 1866, in this city, without a license authorized by law, act as agent for the Germania, Hanover, Republic and Niagara Insurance Companies, created and incorporated in the state of New York, by then and there offering to insure for and on behalf of said companies, and by proposing and offering to issue a policy of insurance binding all of said companies, and commonly known as the underwriter's policy of insurance," &c. See presentment.

To this presentment Samuel B. Paul voluntarily appeared and pleaded "not guilty," whereupon a jury were empanneled to try the issue joined between the commonwealth of Virginia and the said Samuel B. Paul. The jury found a special verdict, in the words and figures following, to wit: Here insert the special verdict. See page 31 of appellant's note of argument.

The verdict finds: "That Samuel B. Paul, a resident of Virginia, on the first day of May, 1866, in the city of Petersburg, Va., without a license authorized by law, did act as agent for the Germania, Hanover, Niagara and Republic Insurance Company, by then and there offering to insure for and on behalf of said *commissioners*, and offering to insure, and actually insuring, a policy of insurance commonly known as the underwriter's policy of insurance, to a citizen of Virginia, which said policy is in the words, letters and figures following, to wit:"

That the Germania, Hanover, Niagara and Republic Insurance

Companies aforesaid, were at the time aforesaid, and are now, foreign insurance companies, each and severally incorporated in the state of New York, under the laws of the state of New York, to carry on the general business of insurance against fire. That the said companies were each duly organized under their several charters or acts of incorporation, and that the corporators of each of said companies were at the time, and are, citizens of the state of New York, or citizens of states of the United States other than the state of Virginia. See the special verdict.

It is deemed unnecessary to quote more of this special verdict in this note, as it is set forth at large, and it is concluded truly in the note of argument filed by the appellant here, Samuel B. Paul, who was the defendant in the court below.

It is difficult, if not impossible, to discover the reason upon which the jurisdiction of this court can be sustained in this case. The presentment was made by the grand jury of the state court against the defendant Samuel B. Paul, of the city of Petersburg, for a violation of the revenue laws of the state of Virginia; the case was tried upon the plea of not guilty. The charge is that he acted as the agent of a foreign insurance company, or rather as the agent of foreign insurance companies, without a license authorized by law. This is a presentment against Samuel B. Paul individually, for acting as the agent of four insurance companies created and incorporated in the state of New York. It was necessary to charge that he acted as the agent of a company which had not been incorporated under the laws of Virginia, to define the offence to which he had rendered himself obnoxious under chapter 3, section 58, page 70, of the Acts of 1865–6, of the general assembly of Virginia, passed February 28th, 1866. It will be seen by reference to the law above referred to, that "*the specific license on every person to act as agent for any foreign insurance company shall be twenty-five dollars for each agency.*" It will be seen that this is a personal tax imposed upon the person who acts as the agent of a foreign insurance company within this state, and is not a tax imposed upon such foreign insurance company. If there be any doubt about this being the proper construction of the act of assembly above referred to, it is submitted that the forty-seventh section of chapter two, page forty-eight, of the same acts of assembly, will remove all such doubts, and it is under this 47th section that the appellant, Samuel B. Paul, was presented. By reference to this section it will be seen it provides: "No person shall, without a license authorized by law, act

as agent for any foreign insurance company; and any person offering to insure, or who makes any contract or policy of insurance for or on behalf of any company created or incorporated elsewhere than by or in this state, shall be regarded as an agent of a foreign insurance company. Any person acting as above as an agent of any such foreign insurance company, shall pay a fine of not less than fifty dollars nor more than five hundred dollars for each offence."

Under the law above cited, and the pleadings in this case, the only question submitted to the jury in the court below, for its decision, was whether or not the defendant Samuel B. Paul had acted as the agent of a foreign insurance company. The charge was that he had so acted, and the plea was, "not guilty." It is submitted it was neither necessary to allege in the presentment, or to prove upon the trial, anything more than that Samuel B. Paul had, on the first day of May, 1866, in the city of Petersburg, in the state of Virginia, offered to insure, and made a contract and policy of insurance for and on behalf of a company created or incorporated elsewhere than by and in the state of Virginia. This would have been a charge in the words of the act of assembly, and would have been sufficient. The prosecution would then have been sustained upon proof, that the defendant had acted as the agent of a company created or incorporated elsewhere than by or in the state of Virginia. It would not have been necessary for the prosecution to show by evidence or otherwise in what state or county the company was created or incorporated, it would have been sufficient to show it was not created or incorporated by or in Virginia. Then, upon the pleadings in this case, the defendant in the court below, the appellant here, was clearly guilty of having violated the law of Virginia. But it may be said that corporations act only by their agents, and that Samuel B. Paul acted as the agent of the Germania, Hanover, Niagara and Republic Insurance Companies, created and incorporated in the state of New York. It has been shown that it was not necessary to have named the companies, or when they were incorporated, that it was only necessary to have alleged that he acted as the agent of a foreign insurance company, whether the company was created or incorporated by one of the states of the American Union or any other state or country, the naming of the companies being merely surplage, might have been rejected, and upon the plea of not guilty only, should have been, and the case stood only upon the charge against the defendant, for having

acted as the agent of a foreign insurance company without a license authorized by law; and if the jury had under that state of things responded to the pleadings, and found a general verdict of "guilty," and fixed the fine at fifty dollars, there could have been no pretense that the verdict was wrong, or that this court could have had any jurisdiction over the case. In that case it would have been a presentment in a court of Virginia by the commonwealth of Virginia against a resident of Virginia for a violation of her revenue laws; and so far as I am informed, it has never been asserted even that the supreme court of the United States had or could take jurisdiction of such a case. No question did or could arise upon this case on the pleadings, which could have justified this court in taking jurisdiction of it. The presentment charges the defendant with the violation of one of the revenue laws, to which the defendant pleads "not guilty;" the simple question for the jury to determine was, whether the defendant had violated the law as charged, and by the verdict they say he had. No question was made by the pleadings, *as appears in the record*, which give this court jurisdiction in this case, and without which it has been frequently decided this court has no jurisdiction. This identical question has been before this court several times, and the decisions upon this point have been uniform. See Miller vs. Nicholls, 4 Wheaton, page 311; Canwell vs. Randall, 10 Peters 368; the Planter's Bank of Mississippi vs. Sharp, 6 Howard 301; and Baldwin and others vs. Payne and others, 6 Howard 332; and the Grand Gulf Railroad and Banking Company et al vs. Marshall, 12 Howard 165.

Mr. Chief Justice Taney in delivering the unanimous opinion of the court in 12 Howard, at page 167, says: "But in order to give this court jurisdiction, the record must show that the point was brought to the attention of the state court, and decided by it. It is not sufficient that the point was in the case, and might have been raised and decided. It must appear that the validity of the state law was drawn in question, and the judgment founded upon its validity. This is evidently the meaning of the 25th section of the act of 1789, which gives the writ of error. And the reason is obvious. The party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the constitution or laws of the United States. But if he omits to claim it in the state court, there is no reason for permitting him to harrass the adverse party by a writ of error to this court, when, for anything that appears in the record, the "judg-

ment of the state court might have been in his favor, if its attention had been drawn to the question."

The record in this case, as has already been said, is very short; an inspection of it will show that the question upon which this court is invoked to assume jurisdiction, is no where mentioned in the record. If the defendant had by plea, or other proceeding proper in such a case, have brought to the attention of the state court the point he is now asking this court to decide, and the state court had decided against him, possibly this court might have taken jurisdiction of his case; but it is presumed this court could not even then have entertained jurisdiction of the case. But it is not sufficient that the point was in the case, and might have been raised and decided. It must appear that the validity of the state law was drawn in question, and the judgment founded upon its validity; and this must appear upon the record, say this court in the case cited above from 12 Howard. It has been said the only plea in the court below was, "not guilty." If this is to be regarded as a civil case, it could not have been stayed or reversed after verdict for any defect, imperfection or omission in the pleadings, which could not be regarded on demurrer, or for any other defect, imperfection or omission, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of. See Code of Virginia 1860, chapter 181, section 3, page 743. If it be considered a criminal case, the act of the legislature of Virginia is equally clear that "judgment in any criminal case after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offence be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case." See Code of Virginia 1860, chapter 207, section 12, page 832. Having said this much, to show that under the pleadings and proofs and the record in this case, this court could not hold jurisdiction of this case, the attention of the court will be briefly called to the verdict rendered by the jury, and the judgment of the court below given on it. This verdict has heretofore been called a special verdict; it might more properly be termed *a general verdict, subject to a special case*; at first view this may seem to be a mere technical difference, but upon an examination of the elementary writers upon pleading, it will be seen it is a substantial difference in the effect of the finding of the jury. Upon a special verdict all the facts of the case are put upon the record, from which a writ of error may be had; but in a general verdict,

subject to a special case, the verdict is not entered *on record*, and consequently a writ of error cannot be brought on the discussion. Stephens on Pleading, second American edition, by Francis J. Troubat, page 124; Archibald's Practice, first edition, page 189. In this case the jury find the facts. In the first section they find "that Samuel B. Paul, the defendant in this prosecution, a resident of Virginia, on the first day of May, 1866, in the city of Petersburg, in the state of Virginia, without a license, authorized by law, did act as agent for the Germania, Hanover, Niagara and Republic Insurance Companies, by then and there offering to insure for and on behalf of said commissioners, and offering to insure, and actually issuing a policy of insurance, commonly known as the underwriter's policy of insurance to a citizen of Virginia, which said policy is in the words, letters and figures following, to wit:" If this was the whole finding, it would clearly be a general verdict of guilty. It is directly responsive to the charge and plea.

The second section of the verdict finds that the said companies are foreign insurance companies, each and severally incorporated in the state of New York, under the laws of the said state of New York, to carry on the general business of insurance against fire. That the said companies were each organized under their several charters or acts of incorporation, and that the corporators of each of said companies were, and are citizens of the state of New York, or citizens of states of the United States other than the state of Virginia, &c. That the said defendant, Samuel B. Paul, was on the day and year aforesaid the agent and attorney in fact of said companies in and for the said city of Petersburg, and had filed with the auditor of public accounts of the state of Virginia, as required by law, his written power of attorney as such, duly executed, certified and authenticated according to law. That the said defendant, Samuel B. Paul, previous to the time when he acted as agent of the said insurance companies as aforesaid, had made to the commissioner of the revenue of the city of Petersburg, in the state of Virginia, the proper officer of said state in said city, a demand or request for a license or licenses to act as agent in said city for said companies, in carrying on the business of fire insurance in said city, and had offered to comply with all the requirements of the statutes of said state of Virginia respecting foreign insurance companies, including a tender in lawful money of the amount of said license tax, save and except so much of the provisions of the sections first and second of the act of assembly passed on the 3d day

of February, 1866, entitled "an act to require a deposit of securities to be made by foreign insurance companies doing business in this state," as required the deposit, with the treasurer of the state, of certain bonds, and requiring the exhibition by such agent to the commissioner of the revenue of the treasurer's receipt for the bonds required to be deposited with him. Then follow the two sections of the act of assembly referred to; they are copied in the verdict and therefore omitted here.

In this second sentence of the finding of the jury, it is presumed, is contained the facts relied upon by the appellant in this court, to justify this court in taking and maintaining jurisdiction in this case. Are the facts found sufficient for that purpose? We submit they are not. Let us examine the verdict.

First. The jury find that the said companies were foreign insurance companies, each incorporated in the state of New York under the laws of New York, to carry on the general business of insurance against fire. That said companies were each organized under their charters, and that the corporators were citizens of New York, or of other states of the United States, than the state of Virginia. That the said companies agreed among themselves to issue policies of insurance in the form hereinbefore set forth, and that said companies are carrying on business in the state of New York and *elsewhere* under policies of the form aforesaid. The conclusion from this finding is, that as these companies were created by the laws of New York; that their principal place of business is in that state somewhere, but the jury do not find the fact as to the location of their place of business, if it be in the state of New York or elsewhere. The jury then find that the defendant Samuel B. Paul was the agent and attorney in fact of said companies, and had filed with the auditor of public accounts of Virginia the power of attorney as such; that the said Paul had, previous to his acting as said agent, applied to the commissioner of the revenue of the city of Petersburg, the proper officer of said state and city, for a license or licenses as agent of said companies, and offered to comply with all the requirements of the statutes of Virginia respecting foreign insurance offices, including a tender of the license tax, save and except the deposit of the bonds or securities required by the act of assembly.

Second. Samuel B. Paul could not act as the agent of these companies in Virginia until they had complied with the laws of the state of Virginia, for until then they had no existence in that state.

This court has frequently decided that a corporation was a mere legal entity and could have no legal existence outside of the dominion of the state by which it is created. Bank of Augusta vs. Earle, 13 Peters 519. This case was referred to with approval by chief justice Taney in delivering the judgment of the court in the case of Covington drawbridge company vs. Shephard et al., 20 Howard 227. In this last case, at page 233, the chief justice, in referring of the Lafayette insurance company against French, says, the declaration stated that the corporation itself was a *citizen* of Indiana. Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a state in the sense in which that word is used in the constitution of the United States, and the averment was rejected because the matter averred was simply impossible. Yet that is the precise question and the only question upon which the appellant relies here. He insists that a corporation is a citizen of a state within the scope and meaning of article 4, section 2, of the constitution of the United States, which provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This court has several times decided that a corporation is not a citizen within the meaning of the constitution.

In the case of the Lafayette ins. co. vs. French et. als., 18 Harwood, page 404, Mr. Justice Curtis in delivering the opinion of this court, at page 405, says, "The averment, that the company is a citizen of the state of Indiana, can have no sensible meaning attached to it." This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the constitution. And, therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed. In the case of the Covington drawbridge company vs. Shephard et. als, 20 Howard, page 227, at page 233, referring to the case of the Lafayette insurance company vs. French, Mr. Chief Justice Taney in delivering the opinion of the court, uses the following language: "Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a state in the sense in which that word is used in the constitution of the United States, and the averment was rejected because the matter averred was simply impossible."

The last case to which this court's attention is invited, is the case of the Ohio and Mississippi railroad company v. Wheeler, 1 Black's

reports page 286. Mr. Chief Justice Taney in delivering the opinion of this court, in the case last cited, refers to several cases before decided in this court. At page 295 he says: It had been decided in the case of *The Bank* v. *Donning* (5 Cr. 61) long before the case of the Bank of Augusta vs. Earle came before the court, that a corporation is not a citizen in the meaning of the constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different state from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that state. Many more cases might be cited upon the same point.

The proposition which the appellant maintains is, that a corporation is a citizen of a state, and as such citizen, is, under the second section of the 4th article of the constitution of the United States, entitled to the privileges and immunities of citizens of the several states, and therefore, the laws of the state of Virginia requiring foreign insurance companies to deposit with the treasurer of the state certain specified securities as a condition precedent to their doing business in the state is unconstitutional and void. If the assumption that a corporation was a citizen in the contemplation of the constitution of the United States were correct; yet it would by no means follow, that a citizen of a state residing in one state, would be entitled to the privileges and immunities of citizens of each of the other states. Politically, it is very certain he would not, and it is not seen very clearly how he could in all other things; there is no question, that a citizen of any particular state, who removes into any other state of the union and resides there long enough to become a citizen, is entitled to all the privileges and immunities of the latter state, without being required to be naturalized. He would become a citizen by the mere operation of the constitution of the United States. By such removal he might lose some of his privileges, whilst he gained others; after he became a citizen of a state he could not sue a citizen of the same state in the courts of the United States. To illustrate, a citizen of New York may sue a citizen of Virginia in the United States courts; if the citizen of either of the states removes into the state of the other and incurs a debt or liability being citizens of the same state, the United States court would not have jurisdiction: many other instances might be cited, but we will forbear.

It is the duty of all governments to pass all laws which may be necessary to shield and protect its citizens. The companies of which

the appellant claims to be the agent, is presumed to have their residence in New York, and all of their effects are there. The deposit required by the law of Virginia is for two purposes: first, to insure the payment of the taxes, and second, as an indemnity to the insured. There is no other tax than one per cent. imposed by the law of Virginia on the assessments collected and premiums received, and obligations for such premiums from foreign insurance companies. See chapter 3, schedule E, section 16, page 63, of the acts of the legislature of Virginia, session acts 1865–'6. Whilst by reference to section 15 of the same chapter and page, the tax on the insurance companies incorporated by the state is three per centum on the dividend declared. There is no specific tax on either foreign or domestic insurance companies. There is a specific tax on the agent of a foreign insurance company of twenty-five dollars. It is very true, that foreign insurance companies do not assume to compel our citizens to make contracts with them; and it is equally true, the state of Virginia does not assume to compel foreign insurance companies to establish offices within her limits. No foreign insurance company has a right to come into Virginia by her agents, to do the business of insurance, without the consent of Virginia, and, in giving her consent, she has the perfect right to impose such reasonable conditions as she may deem necessary and proper to secure the payment of her revenue and the security of her citizens from impositions and frauds. The 3d, 4th, 5th and 6th sections of the act of the legislature of Virginia of the 3d of February, 1866, before cited, show clearly what was the object and purpose of the legislature in requiring the deposit of securities by foreign insurance companies. Section 3 requires the company, at the time of the deposit of the bonds with the treasurer, to deliver to him a power of attorney, authorizing him to transfer the said bonds to pay its liabilities under this act. Section 4 provides, the treasurer at the time of receiving the bonds shall give to the company authority to draw the interest thereof, which authority shall continue until the company fail to pay any of its liabilities upon its insurance, policies made in favor of any citizen or inhabitant of this state, &c. Section 5 provides for a sale of the bonds to pay the liabilities of the company, &c., &c. Slaughter vs. The Commonwealth, 13 Grattan's Reports, page 767.

The law of Virginia, when this case arose as to the tax of a person acting or attempting to act as the agent of a foreign insurance, is somewhat changed in its wording by the acts of 1865–'6,

before cited, from what it was at the time the case of Slaughter vs. The Commonwealth arose, but it is believed the substance and effect of the two laws are about the same.

Slaughter was presented in the corporation court of Fredericksburg for establishing and keeping and transacting business as agent of the Protection Insurance Company of Hartford, incorporated and authorized by the state of Connecticut, without having a license therefor, against the act, &c.

The defendant demurred to the presentment, but afterwards withdrew it, and issue was made upon the plea of "not guilty." The jury found the defendant guilty and assessed his fine at forty dollars. Wherefore he applied for a new trial upon the ground that the verdict was contrary to the evidence; which motion was overruled by the court, and he excepted. He also moved in arrest of judgment, which was overruled, and he again excepted. Judgment was rendered upon the verdict. By these exceptions the evidence was spread upon the record and made a part of it. Slaughter obtained a writ of error from the judge of the circuit court for the county of Spotsylvania, who affirmed the judgment of the corporation court; and then applied to supreme court of appeals for a writ of error, which was allowed to him. No instructions or bill of exceptions was filed in the case now under consideration in this court; no motion for a new trial or in arrest of judgment was made and the evidence was not spread upon the record. It does not appear from the record of either case that any question of the constitutionality of the law of Virginia was brought to the attention of the courts of the state by the pleadings and proofs in either case, which, as has been shown, was necessary to give this court jurisdiction; and it only appears from the argument of counsel that the law of Virginia was in violation of the second section of the fourth article of the constitution of the United States.

Judge Samuels delivered the unanimous opinion of the court of appeals of Virginia in the case of Slaughter vs. The Commonwealth. We think the cases referred to by him fully sustains the decision of the court of appeals in affirming the judgments of the courts below, and rely upon it in this case as a full and complete answer to the argument of the appellant in this case. We therefore respectfully invite the attention of this court to it, and ask that the writ of error awarded to the courts of the state of Virginia may be dismissed.

THOS. R. BOWDEN,
Attorney General of Virginia.